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COURT ADJUSTMENT OF LONG-TERM CONTRACTS: AN ANALYSIS UNDER MODERN CONTRACT LAW

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A manufacturer or utility, contemplating long-term energy needs, enters a twenty-year fuel supply agreement. The buyer and supplier agree on a base price, subject to periodic adjustment based on increased costs of production. The agreement initially is satisfactory to both parties. Then, due to an unanticipated event such as an oil embargo or high inflation, costs dramatically rise and outpace the price-adjustment provision. Because continued performance will result in substantial losses, the supplier proposes an adjustment of the price formula. The buyer refuses to adjust and the supplier, preferring the uncertain results of litigation to certain continuing losses, repudiates the agreement. The buyer then seeks specific performance.[1]

A court may respond in a variety of ways to the problem posed by these facts. It can hold the supplier to the contract by granting the buyer specific performance or damages. Conversely, under the impracticability doctrine, the court can excuse the supplier from performing.[2] Or, it can

* Professor of Law, Cornell Law School. I thank Ted Eisenberg, Allan Farnsworth, and Robert Summers for reading and commenting on drafts of this paper. I also thank the participants of seminars at Cornell Law School and the University of Michigan Law School and members of the audience at the Commercial Law section meeting of the American Association of Law Schools' annual convention in New Orleans in January 1986 for their helpful comments and suggestions. I am also indebted to Candy Ridgway, Cornell '87, who provided excellent research assistance, and Barbara Brown, who typed the manuscript several times.

1. Or, before the buyer brings an action, the supplier might bring an action seeking reformation of the contract or a finding of impracticability. The hypothetical is based loosely on Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied,* 444 U.S. 865 (1979).

2. *See* Waldinger Corp. v. CRS Group Eng'rs, Inc., 775 F.2d 781 (7th Cir. 1985); Northern Corp. v. Chugach Elec. Ass'n, 518 P.2d 76, *vacated,* 523 P.2d 1243 (Alaska 1974).

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grant relief based on a party's restitution or reliance interest.[3] In the alternative, the court can try to induce a settlement, for example, by deferring any holding and ordering the parties to bargain further. Finally, the court can adjust the contract, such as by modifying the terms of the agreement and conditioning specific performance on acceptance of the changes. Courts typically have followed the first approach, barring any relief to the supplier.[4] The last approach, court adjustment, has enjoyed little judicial acceptance.[5]

Opposition to court adjustment is typically founded on one or more of the following concerns. First, the supplier promised to perform a carefully planned agreement, and, therefore, assumed the risk of the onerous circumstances. By adjusting the parties' well-planned agreement, courts would threaten freedom of contract, produce uncertainty, and deter planning.[6] Second, even if the supplier were entitled to some relief, courts lack sufficient information and expertise to determine precisely *when* adjustment is appropriate.[7] Again, the present approach—either the supplier is excused or it must perform or pay damages—has the virtue of certainty. Additional categories would only confuse. Third, in long-term contract settings,[8] courts have insufficient guidance on the appropriate terms of an adjustment, and, in any event, judges are personally ill-

3. *See generally* Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution,* 69 YALE L.J. 1054, 1056-57 (1960).

4. *See* Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts,* 76 NW. U.L. REV. 369, 376 (1981); *see also* Bernina Distribs., Inc. v. Bernina Sewing Mach. Co., 646 F.2d 434, 439-40 (10th Cir. 1981) (cost increases alone do not render contract impracticable; court will order specific performance).

5. Only one court has adjusted a long-term contract in a situation similar to the one described in the opening problem. *See* Aluminum Co. of Am. (Alcoa) v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980). Some courts in dicta indicate that they might reform a contract in an appropriate case. *See, e.g.,* Gerard v. Almouli, 746 F.2d 936, 939-40 (2d Cir. 1984); Freidco, Ltd. v. Farmers Bank, 529 F. Supp. 822, 830 n.9 (D. Del. 1981); Florida Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440, 458 (E.D. Va. 1981); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 135-36 (N.D. Iowa 1978), *rev'd,* 603 F.2d 1301 (8th Cir. 1979), *cert. denied,* 445 U.S. 911 (1980); McGinnis v. Cayton, 312 S.E.2d 765, 779-81 (W. Va. 1984); *see also* Macaulay, *An Empirical View of Contract,* 1985 WIS. L. REV. 465, 467-68.

Although court adjustment is relatively novel in our legal system, it is common in others. *See, e.g.,* Dawson, *Judicial Revision of Frustrated Contracts: Germany,* 63 B.U.L. REV. 1039 (1983).

6. *See, e.g.,* Wabash, Inc. v. Avnet, Inc., 516 F. Supp. 995, 999 n.5 (N.D. Ill. 1981); *see also* Printing Indus. Ass'n v. International Printing & Graphic Communications Union, Local No. 56, 584 F. Supp. 990, 998 (N.D. Ohio 1984).

7. *See* Dawson, *Judicial Revision of Frustrated Contracts: The United States,* 64 B.U.L. REV. 1, 31 (1984).

8. I will not attempt to define precisely the necessary duration of a "long-term" contract. Rather, the problem arises whenever the contract is formed against the backdrop described *infra* at notes 21-29 and accompanying text. I refer to long-term contracts here only because contracts of relatively long duration are most likely to be formed with the informality and expectations of flexibility described *infra.*

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equipped to adjust complex commercial contracts.[9] The results would be haphazard, and, again, would deter planning.[10] Fourth, court adjustment would be bad policy, for example, because it would increase the costs of contracting by causing parties to draft around the rule of adjustment, thus deterring some parties from entering long-term arrangements.[11]

In this article, I analyze when, if ever, court adjustment is appropriate. I argue that the supplier is entitled to some form of relief in at least some situations, that these situations can be identified with sufficient precision, that courts have adequate tools to shape appropriate relief, and that court adjustment is good policy in limited, but distinct, circumstances.[12] In Part I, I identify two situations in which court adjustment is appropriate. The first situation calling for adjustment, the "agreement model," occurs when the supplier reasonably expects the buyer to adjust in case of a serious disruption. The buyer's failure to adjust is a breach of contract. The agreement model accounts for the "relational" realities of many contract settings through a theory of the parties' implicit risk allocation.[13] The second situation calling for adjustment, the "gap model," occurs when the supplier has no reasonable expectation of adjustment, but the parties simply fail to allocate the risk of some calamitous event. The supplier will suffer substantial harm from continued performance, but the buyer has materially relied on that performance. The gap model is based primarily on the fairness principle that the parties should agree to share unallocated losses.[14]

In Part II, I argue that when a court identifies a situation ripe for court adjustment, that remedy should not be abandoned on impracticality or policy grounds. I therefore discuss possible approaches to court adjustment and respond to the criticisms outlined above.[15] Because a remedy should be as certain and simple as possible, I conclude that in

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9. Dawson, *supra* note 7, at 17-18, 36-37.

10. *Id.* at 31.

11. *See infra* notes 144-55 and accompanying text.

12. Others have written about the problem of court adjustment. The leading article in support of court adjustment is Speidel, *supra* note 4. This article differs from Professor Speidel's excellent work in three ways. First, I develop an agreement model which justifies court adjustment (hence I refer to court adjustment rather than court-imposed adjustment), whereas Professor Speidel relied on a gap model almost exclusively. *See infra* notes 17-73 and accompanying text. Second, I respond to criticism of court adjustment generated by Professor Speidel's thoughtful piece. *See infra* notes 98-166 and accompanying text. For articles critical of adjustment, see Dawson, *supra* note 7, and Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985). Third, I analyze more fully the kinds of relief appropriate in court adjustment.

13. *See infra* notes 17-73 and accompanying text; *see also* Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 547-48.

14. *See infra* notes 74-91 and accompanying text.

15. *See infra* notes 98-166 and accompanying text.

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many situations court adjustment should be limited to adjustment of the duration of the agreement. Using the contract-law response to the problem of terminable-at-will franchise agreements as a model, I suggest that supply contracts should continue only for a period sufficient to enable the buyer to recoup its reliance expenses.[16]

I. Recognition of a Duty to Adjust

A. *The Agreement Model*

Because most contracting parties are aware that conditions may change during the course of their agreement and that allocating all risks is impossible, too costly, or unnecessary,[17] many long-term contracts expressly require adjustment of terms in light of changed circumstances. For example, some coal contracts include a "gross inequities adjustment provision," which requires the parties to negotiate in good faith to resolve "inequities" resulting from economic conditions that the parties did not contemplate at the time they made their agreement.[18] Alternatively, the parties may expressly agree that the price or other provision is merely a projection and is subject to further negotiation.[19] In either case, when the supplier seeks negotiation under the flexibility-preserving term, the supplier is attempting to perform the contract, not avoid it. The buyer's refusal to bargain would be a breach.[20]

Even if the supply contract contains no express agreement to adjust, the circumstances existing at the time of contracting may demonstrate that the parties intended such a duty. Consider the following typical backdrop to long-term contracting. The parties enjoy relatively equal bargaining strength, are familiar with each other, and have previously dealt with each other. The subject matter of the contract, although not

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16. *See infra* notes 114-19 and accompanying text.

17. On the limits of planning, see Macaulay, *The Use and Non-Use of Contract in the Manufacturing Industry,* PRAC. LAW., Nov. 1963, at 13, 17-18.

18. These provisions are common in long-term contracts. *See* Goldberg, *Price Adjustment in Long-Term Contracts,* 1985 WIS. L. REV. 527, 529 n.5; Joskow, *Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants,* 1 J.L. ECON. & ORGANIZATION 33, 73 (1985). In coal contracts a "market reopener" provision is also common. Such a provision typically allows either party to notify the other that the contract price is inconsistent with the market price. After notice, the parties must negotiate in good faith for an adjustment or, failing to agree, go to arbitration. Scott, *Coal Supply Agreements,* 23 ROCKY MTN. MIN. L. INST. 107, 131-32 (1977).

19. *Cf.* Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 9 (4th Cir. 1971) (evidence of trade usage allowed to show parties intended adjustment of price, quantity, and delivery terms in adverse market).

20. *See* Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two,* 59 N.C.L. REV. 335, 338-43 (1981); *see also* E. FARNSWORTH, CONTRACTS § 3.29, at 202 (1982). Of course, determining whether a buyer refused to bargain will be difficult in many circumstances. *See infra* note 92.

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involving a standardized commodity, is also not unusual (for example, the sale of coal). The parties are therefore comfortable with little formality.[21] In addition, the parties want to continue to deal with each other because they are aware of the costs of finding a market substitute after investing in a relationship[22] and after forming understandings that lower the cost of doing business.[23] In short, the parties want to continue a profitable relationship[24] and maintain their goodwill and reputation in their industry.[25]

Such parties to long-term contracts also are interested in ensuring a supply or a market at a reasonable price, not in making wagers about market shifts.[26] Although they expect disruptions during the course of the agreement, the parties do not attempt to plan for nebulous risks, and they may even fail to allocate some foreseeable but remote risks because allocation costs too much[27] or may rock the boat.[28] Put another way,

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21. Professor Macaulay has written that:

> Contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships. There are business cultures defining the risks assumed in bargains, and what should be done when things go wrong.

Macaulay, *supra* note 5, at 467. *See also infra* note 45; Whitford, *supra* note 13, at 551 (parties rarely negotiate all terms of relationship at origin of contract).

22. *See* Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); *see also* Palay, *A Contract Does Not a Contract Make*, 1985 WIS. L. REV. 561, 562-63; Speidel, *supra* note 4, at 373-74; Whitford, *supra* note 13, at 550.

23. *See* Whitford, *supra* note 13, at 550.

24. *See* Macaulay, *supra* note 5, at 467 ("People perform disadvantageous contracts today because often this gains credit that they can draw on in the future."); *see also* Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 (under relational view of contract, parties cooperate during unexpected contingencies to preserve long-term relationship); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62-65 (1963) [hereinafter Macaulay, *Non-Contractual Relations*] (litigation entails serious expense and parties may wish to continue profitable business relationship in future).

25. *See* I. MACNEIL, THE NEW SOCIAL CONTRACT 66-67 (1980); Beale & Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45, 47 (1975); Macaulay, *Non-Contractual Relations*, *supra* note 24, at 62-65.

26. Professor Goldberg states that, with the exception of commodities sales, "[f]irms do not generally enter into multi-year contracts because of their concern for the future course of prices. Rather, they enter into the agreements to achieve the benefits of cooperation." Goldberg, *supra* note 18, at 531.

27. One incentive for price-adjustment features, according to Professor Goldberg, is to avoid wasteful searching for information on future costs and prices. Price-adjustment features reduce the value of information as to the future and hence discourage costly searches. *See id.* at 532. Goldberg also asserts that price-adjustment features avoid costs resulting when the "loser" in a fixed-price contract engages in conduct such as insisting on strict compliance with quality standards or otherwise "reads the contract literally." *Id.*

28. *See* Beale & Dugdale, *supra* note 25, at 47. Professor Palay has suggested that parties with "strong relational ties" do not worry about a contract's initial terms. Instead, they assume that the contract will be adjusted in light of changed circumstances. *See* Palay, *supra* note 22, at 562 ("Since

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both parties can increase mutual gains from the contract by remaining flexible after signing the contract, thereby saving costs related to planning for risks and bickering after contract breakdown.[29]

With these relational realities explicit, the issue is whether the agreement, although silent on the duty to adjust in exigent circumstances, includes such a duty. In some situations, the answer is "yes."[30] First, the circumstances may support a finding of a trade custom of adjustment,[31] or previous adjustments between the buyer and the supplier may constitute a course of dealing[32] or a course of performance.[33] The Uniform Commercial Code encourages resort to such evidence in interpreting the parties' agreement on the theory that, unless excluded, the parties intended to incorporate the trade custom, course of dealing, or course of performance.[34] Thus, although silent on adjustment, an agreement may

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the costs of drafting, monitoring, and enforcing a once-and-for-all agreement outweigh the benefits, it is far more efficient to cross bridges as they are reached.").

29. *See* Goldberg, *supra* note 18, at 532; *see also* Gottlieb, *Relationism: Legal Theory for a Relational Society,* 50 U. CHI. L. REV. 567, 572-73 (1983) (*"In sustained and inextricable relations a principal use of contracts is to provide a basis for renegotiations* once a defective performance occurs." (emphasis in original)); Palay, *supra* note 22, at 562.

30. *See* Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms,* 73 CALIF. L. REV. 261, 277 n.47 (1985) ("[U]nofficial or other context-generated understandings might be legally enforceable, implied terms.").

31. A trade custom is "any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed." U.C.C. § 1-205(2) (1977). A trade custom need not be "ancient or immemorial"; a new custom observed regularly in the trade is sufficient because it is likely to be adopted by the parties. *See* R. HILLMAN, J. MCDONNELL & S. NICKLES, COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶ 3.07[2][a][i], at 3-34 (1985).

32. A course of dealing is defined as a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1) (1977). For applications of the principle that a course of dealing can affect contract interpretation, see Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 796 (9th Cir. 1981); and Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 7-11 (4th Cir. 1971).

In their study of 19 engineering manufacturers in Bristol, England, Beale and Dugdale found that the manufacturers' contracts of sale and purchase were largely "tacit," in that certain terms, customs, and "unwritten" laws were widely accepted (for example, certain buyer losses would not be compensated). Beale & Dugdale, *supra* note 25, at 47.

33. U.C.C. § 2-208(1) (1977) provides:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

34. The UCC focuses on the parties' bargain in fact, as found in the written agreement and in course of dealing, usage of trade, or course of performance. *Id.* § 1-201(3). *See also* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 796-805 (9th Cir. 1981) (collecting cases); American Mach. & Tool Co. v. Strite-Anderson Mfg. Co., 353 N.W.2d 592, 598 (Minn. Ct. App. 1984); Campbell v. Hostetter Farms, Inc., 251 Pa. Super. 232, 237-39, 380 A.2d 463, 466 (1977). *See generally* Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory,* 1977 U. ILL. L.F. 811.

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require it. Again, a refusal to adjust would be a breach.[35]

Apart from any duty based on trade custom, course of dealing, or course of performance, a party may have a good-faith duty to adjust.[36] In problems of performance, good faith requires "cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations."[37] In our example, then, performance by the buyer contrary to the supplier's reasonable expectations is in bad faith. The supplier's argument is that, as a result of the circumstances at or after the time of contracting, each party reasonably expected the other to act consistently with its interests by being flexible and cooperating to preserve the relationship when serious trouble arose.[38]

Adjustment often may be precisely what the parties expect. The best way to maintain an informal, harmonious relationship, preserve goodwill and reputation, and protect one's investment is to remain flexible and avoid disputes and litigation.[39] Indeed, disagreements in long-

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Reliance on trade custom and the like to determine the parties' intentions is by no means novel—it is part of a "new spirit of contract." *See* Speidel, *The New Spirit of Contract,* 2 J.L. & COM. 193, 199-200 (1982).

35. Evidence of trade custom and the like can supplement agreements, explain them, or even change the literal meaning of express terms. *See* R. HILLMAN, J. MCDONNELL & S. NICKLES, *supra* note 31, ¶ 3.07[2][a][i], at 3-35; *see also* Western Indus., Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1204 (7th Cir. 1984) (evidence of trade custom may give rise to binding contract provision, overriding contrary UCC "gap-filler" provision); American Mach. & Tool Co. v. Strite-Anderson Mfg. Co., 353 N.W.2d 592, 596-98 (Minn. Ct. App. 1984) (evidence of trade usage and course of dealing admissible to show that delivery dates were estimates, despite "time of the essence" clause).

36. A practice of adjusting may not yet have ripened into a trade custom, for example, because of insufficient regularity of observance; the particular parties nevertheless may expect the practice to be observed. Furthermore, a court may not yet have recognized the trade custom so that it has not become an "implied term for all transactions within the relevant category." Goetz & Scott, *supra* note 30, at 278.

37. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 666, 669 (1963).

38. One "informality" in many long-term agreements is the limited use of dispute resolution clauses. Business people are reluctant to negotiate concerning an appropriate dispute resolution clause when future problems are uncertain or are supposed to be settled amicably. Most commercial contracts thus contain no dispute resolution clause, although some contain boilerplate arbitration clauses. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 540-41 (1985). The absence of a dispute resolution clause therefore should not lead to the conclusion that the parties did not expect flexibility or expected a promisor to perform under all circumstances.

39. A consultant to the fertilizer industry testified as follows in Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971):

> Q What has been your experience in the [fertilizer] industry with reference to [the quantity specified in the contract]? Are these contracts for fixed amounts, are they enforced [sic] to buy them?
>
> A Ordinarily not because you want to sell him again next year. You never force him to take his contract tonnage.

Appendix and Exhibits at 169, *reproduced in* Kirst, *supra* note 34, at 847 n.88.

Because each contracting party is likely to make significant investments in its long-term contract, each becomes vulnerable to "strategic" behavior by the other party when unallocated contin-

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term settings are most often settled without pursuing legal remedies.[40] Contracting parties view their obligations as growing not only out of the contract, but also out of the norms of their relationship such as cooperation and compromise.[41] As Karl Llewellyn long ago pointed out, the written contract is only a "rough indication around which [real working] relations vary."[42] For example, when confronted with large cost increases, one coal supplier recently requested relief from more than forty utilities. Only two utilities balked, and the contract of one of those that refused had less than a year to run.[43]

Obviously, not every contract raises a duty to adjust if something goes awry. If the scenario is not what I have described—for example, if the agreement is a large one-time deal involving a standardized commodity—a reasonable party might not expect the other to adjust.[44] In addi-

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gencies arise. Both parties, therefore, have an interest in agreeing to a procedure to allocate such risks when they do arise. *See* Williamson, *supra* note 22, at 249; *see also* Palay, *supra* note 22, at 562-63.

40. *See generally* Macaulay, *Non-Contractual Relations, supra* note 24, at 62 (business persons have their own norms and do not rely on legal rules).

41. *See, e.g.*, Beale & Dugdale, *supra* note 25, at 47-48 (belief in mutual fairness and desire to conduct transactions in future create norms in contractual dealings).

42. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 737 (1931). *See also* Lipton, *Contract and Uncertainty*, 1 CARDOZO L. REV. 449, 450-51 (1979) ("Contract . . . represents a constant coming to terms, an expression of an ongoing relationship, a congruence of interests continuing over time.").

43. *See* Brief for Peabody Coal Co. at 21, Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979). The supplier requested monthly instead of semiannual adjustments of the price of coal according to the contract's price escalation provision. *Id.* at 20-21. *See also* North Cent. Airlines v. Continental Oil Co., 574 F.2d 582, 585 (D.C. Cir. 1978) (noting that many of Continental's customers voluntarily accepted price increases during oil crisis of 1970's).

Obviously, if the supplier is driven out of business or into bankruptcy and therefore cannot continue to supply the buyer, this will not in most cases serve the buyer's interests. *See, e.g.*, Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 516 (1977) (observing that buyers of uranium from Westinghouse Electric Corporation have an interest in Westinghouse remaining solvent, because someone must provide engineering, parts, and service for reactors); *see also* Scott, *supra* note 18, at 124 ("Buyers have . . . frequently recognized the wisdom of reasonable escalators, as they are interested in having a coal supplier which is able to continue to operate the mine at a reasonable profit level."). Professor Dawson observed that although Westinghouse faced losses of over two billion dollars in its agreements to supply uranium for 49 nuclear power plants due to sharp market increases in the price of uranium, and although the trial judge believed Westinghouse was not entitled to relief, the creditors "motivated presumably by their own self-interest in preserving it as a fully functioning enterprise, agreed to settlements that were vastly more lenient than any that a court would have been bold enough to propose." Dawson, *supra* note 7, at 25-26 (footnote omitted).

44. Professor Goldberg has suggested that in contracts for future delivery of commodities traded in "thick markets" the parties typically would not include price adjustment features or permit the disadvantaged to seek judicial relief. Nevertheless, "[t]he more isolated the exchange is from the market, the more likely it is that the parties would find price adjustment efficacious." Goldberg, *supra* note 18, at 543. *See also* Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265, 279-85 (1984) (statistical study shows specialized

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tion, even if adjustment of terms in the face of unanticipated circumstances is customary in the trade, the parties have adjusted in the past, or the parties expect to adjust in the future, they may view adjustment as a matter of comity—i.e., as a "favor" that may be returned, not as something required under the law of their contract.[45] In short, these parties may believe they have the legal right to refuse to adjust, although in practical terms they believe they will adjust. The parties view contract law as a club held in reserve but infrequently used.[46]

When the parties view adjustment only as a matter of comity,[47] a buyer would have the right to refuse to adjust. Suppose, however, that the parties contract under circumstances creating an expectation of flexibility,[48] without acknowledging the contract club. Under traditional objective assent theory of contract formation,[49] the club is lost, and a duty to adjust arises if, at the time of contracting or thereafter,[50] a party rea-

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agreements much more open to adjustment than nonspecialized agreements); Evan, *Comment,* 28 AM. SOC. REV. 67, 68 (1963) (the greater the bargaining power discrepancy, the less likely a norm of flexibility and renegotiation).

45. These are apparently the circumstances of television production agreements. A contract between a network and program producer typically calls for supplying programming (such as a television series) for a number of years with an option for additional years. The contract usually includes provisions for increasing the producer's fee, but only for limited contingencies such as industry-wide increases in laboratory costs. The actors' salaries, paid by the producer, are initially generally low because the success of the series is unknown, but there is a general understanding that the actor and producer will renegotiate if the series is a hit. And although the agreement between the producer and network includes no provision for an increase in fees due to increased actors' salaries or generally due to the success of the show, a "practice" has developed to renegotiate fees on these bases. *See* Thompson, *The Prime Time Crime,* ENT. L.J., Summer 1982, at 1; Letter from Dixon Q. Dern, a lawyer in the television industry for more than 20 years, to Robert A. Hillman (Aug. 5, 1985); *see also* Kirst, *supra* note 34, at 848-49 (noting custom of similar flexibility of contract terms in the fertilizer industry).

Beale and Dugdale's study found that the spirit of trust and the desire to maintain a reputation required that "[e]ach side had to be prepared to make concessions and to do so in a spirit of co-operation." Beale & Dugdale, *supra* note 25, at 48. Nevertheless, contract law was an "umbrella" under which the parties operated.

46. *See* Macaulay, *supra* note 17, at 15-16.

47. This "comity" view is how the matter of adjustment was described in the letter from Dixon Q. Dern to Robert A. Hillman, *supra* note 45.

48. *See supra* notes 21-29 and accompanying text.

49. *See* Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 388, 105 S.W. 777, 778 (1907) ("In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts.").

50. If a party's reasonable expectations of adjustment are based on circumstances arising after contract formation, such as repeated instances in which the other party does not insist on performance according to the letter of the contract, the express term may be waived or a course of performance established. As to the former, a waiver is an intentional relinquishment of a right. Some courts require consideration to support a waiver, *see, e.g.,* Voelker v. Joseph, 62 Wash. 2d 429, 435, 383 P.2d 301, 306 (1963), while others do not. *See, e.g.,* Carfi v. De Martino, 181 Misc. 428, 430, 46 N.Y.S.2d 134, 136 (Sup. Ct. 1944). Consideration for the buyer's waiver of the right to insist on

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sonably believes that no legal club is available. Courts should not overlook the possibility of such reasonable expectations in the long-term contract setting by uniformly holding a party to a written price (or other) term.[51]

A duty to adjust, therefore, can override express contract terms such as fixed-price terms or even price-adjustment formulas, provided that the parties reasonably expect those terms to yield to the implied duty.[52] The amount of bargaining over a particular express provision and the parties' purpose in including the provision are obviously critical in determining whether adjustment trumps an express provision. For example, in *Missouri Public Service Co. v. Peabody Coal Co.,*[53] a coal supplier sought in contract negotiations to use the Consumer Price Index as an index for adjusting the price for increased production costs. The electrical utility insisted on using the Industrial Commodity Index. The parties adopted the Industrial Commodity Index, but it failed to keep pace with the sup-

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performance without adjustment can be found in the supplier's agreement not to insist on the buyer's performance in circumstances exigent to the buyer (i.e., to be flexible itself); the supplier's reliance on the waiver can be found in the supplier's forgoing opportunities to deal with other more flexible buyers.

In the Beale and Dugdale study of engineering manufacturers' contracts of sale, the authors found that sellers often gave "informal" extensions of credit to large and regular customers by, for example, permitting the buyers to pay one month late. *See* Beale & Dugdale, *supra* note 25, at 51. Under the law of waiver, the sellers may have lost the right to insist on performance on time. *See, e.g.,* Margolin v. Franklin, 132 Ill. App. 2d 527, 530-31, 270 N.E.2d 140, 142-43 (1971).

For a discussion of course of performance, see *supra* note 33 (quoting U.C.C. § 2-208 (1977)).

51. The parol evidence rule should be no hurdle to the admissibility of the requisite evidence. Most of the evidence will be objective evidence admissible under U.C.C. § 2-202(a) (1977). Evidence such as the parties' subjective views on the degree of flexibility built into the contract should be admissible because the parties did not intend the writing to be complete on this point. *See id.* § 2-202. In addition, the parol evidence rule does not bar evidence of a course of performance or of a waiver subsequent to contract formation.

52. *Cf.* Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 7 n.3 (4th Cir. 1971) (in the fertilizer industry, parties do not feel bound to contracts that become unappealing due to changes in market conditions).

Columbia Nitrogen is perhaps the leading case in which a court admitted evidence of a trade usage contradicting a written term. *See also* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 791-92, 797 (9th Cir. 1981); Dixon, Irmaos & Cia v. Chase Nat'l Bank, 144 F.2d 759, 762 (2d Cir. 1944), *cert. denied,* 324 U.S. 850 (1945); American Mach. & Tool Co. v. Strite-Anderson Mfg. Co., 353 N.W.2d 592, 597-98 (Minn. Ct. App. 1984). *But see* Southern Concrete Servs., Inc. v. Mableton Contractors, Inc., 407 F. Supp. 581, 582-85 (N.D. Ga. 1975) (although parties did not stipulate in contract that trade usage would not apply, parol evidence inadmissible since parties had no prior dealings and contract set out specific terms), *aff'd,* 569 F.2d 1154 (5th Cir. 1978); State *ex rel.* Nichols Mach. Co. v. Safeco Ins. Co. of Am., 100 N.M. 440, 444, 671 P.2d 1151, 1155 (Ct. App.) (parol evidence inadmissible when specific contract terms "leave no room for a contrary construction consistent with Contractor's claimed usage of trade"), *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983).

53. 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied,* 444 U.S. 865 (1979).

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plier's costs.[54] The price formula selected by the parties was thus a dickered term, suggesting that the parties did not intend to change the term later.

Even in such situations, the parties may not have intended a price formula to govern adjustment when the cost increase is extreme, especially if the index used does not appear to work the way the parties intended. The parties may have designed the formula to ensure the supplier a recovery of its costs plus a reasonable profit, and to protect the utility from uncapped price increases under foreseeable conditions. Thus, both parties may have used such a feature to limit their risks. But when costs dramatically outpace the price formula, and the formula does not limit the supplier's risks, the provision may not apply because the parties did not intend it to apply. Instead, assuming the circumstances otherwise support a reasonable expectation of adjustment, the parties have a duty to adjust the price provision.

Although it fails to discuss the adjustment duty, *Aluminum Co. of America (Alcoa) v. Essex Group, Inc.*[55] is an example of a case in which a price formula apparently failed to achieve the parties' goal of limiting their risks. The parties agreed to refer to the Wholesale Price Index-Industrial Commodities (WPI) to adjust the nonlabor production costs borne by Alcoa in converting alumina to aluminum for Essex.[56] The price formula included a ceiling on how much Essex would be required to pay, but no floor. The WPI failed to reflect unanticipated cost increases due to oil price inflation and pollution control, causing Alcoa a projected loss of over sixty million dollars for the remainder of the contract.[57] Alcoa argued that the WPI did not work as the parties intended and that relief was appropriate.[58]

The district court agreed. In its view, the issue was whether the parties intended the WPI to apply regardless of the circumstances, or whether they intended the index to apply only within a range of potential cost fluctuations, with additional adjustments to be made through further bargaining when the range was exceeded. Weighing all the circum-

54. The supplier, unable to obtain an adjustment, sought relief under UCC section 2-615 (impracticability), but the court denied relief because losses resulted from foreseeable economic trends and did not alter the "essential nature of the performance." *Id.* at 728 (quoting U.C.C. § 2-615 comment 4 (1977)).

55. 499 F. Supp. 53 (W.D. Pa. 1980).

56. *Id.* at 58.

57. *Id.* at 58, 73.

58. *Id.* at 56. Nonlabor production costs more than tripled from 1973 to 1978 (5.8 cents to 22.7 cents per pound), while the WPI less than doubled. *Id.* at 59. Although the court was unclear on how it determined the extent of Alcoa's losses, Professor Goldberg suggests that the court's estimate is irrelevant. More important is Alcoa's loss of the chance to sell to someone else. This loss was over $20 million just in the year suit was brought. Goldberg, *supra* note 18, at 536.

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stances, the court found that the parties intended the latter.[59] Especially persuasive to the court was the fact that the parties were "huge industrial enterprises" with highly trained, sophisticated managements.[60] Such parties plainly sought to limit their risks, as evidenced by other contract provisions such as the "elaborate 'force majeure' clauses" and the "care and expense" of the negotiations and drafting.[61] In addition, Alcoa proposed the WPI only after determining that the WPI had "closely tracked" Alcoa's nonlabor production costs for years and was likely to do so in the future.[62] Some of this evidence may not be highly persuasive, and perhaps when a court encounters a detailed price provision the initial assumption should be that the parties intended it to apply in all circumstances. Nevertheless, the court should not preclude the supplier from showing otherwise.[63]

A foreseeability test may help in determining whether a duty to adjust arises. For example, we can assume that parties to a long-term contract intend that any detailed price-adjustment formula apply to readily foreseeable circumstances—after all, why else draft such a provision? Suppose, however, that the supply contract contains a fixed-price term. Some courts assume that absent an express allocation of risk, the parties must have intended to assign all foreseeable risks to the supplier.[64] As we have seen, however, the parties may have failed to allocate even foreseeable risks;[65] the parties may have decided that a carefully negotiated allocation of risks would not suit their interests. They may, for example, have thought that such a contract would be insufficiently flexible or would sour a prosperous relationship.[66] The parties also may have determined that further negotiation about risk allocation would not be cost-effective.[67] Supporting these determinations may be the expectation that if the risk comes to pass, the parties will cooperate to deal with it. In a fixed-price contract, then, there is no persuasive reason why even foreseeable risks must fall automatically on a party rather than trigger an ad-

59. *Alcoa,* 499 F. Supp. at 68-70.

60. *Id.* at 68.

61. *Id.* at 68-69.

62. *Id.* at 69.

63. *See* National Presto Indus., Inc. v. United States, 338 F.2d 99, 109-10 (Ct. Cl. 1964) (seller's acceptance of fixed-price contract did not suggest assumption of all risks), *cert. denied,* 380 U.S. 962 (1965).

64. *See, e.g.,* Raner v. Goldberg, 244 N.Y. 438, 441, 155 N.E. 733, 734 (1927); *see also* Hillman, *An Analysis of the Cessation of Contractual Relations,* 68 CORNELL L. REV. 617, 625 (1983).

65. *See supra* notes 27-28 and accompanying text.

66. *See supra* notes 28-29 and accompanying text.

67. *See supra* note 27 and accompanying text.

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justment duty.[68] In fact, these arguments concerning the fallibility of the foreseeability test suggest that even a price-adjustment formula may not be designed to allocate some foreseeable but remote and harmful risks.

Assuming that an implied agreement to adjust exists in some circumstances, we still must determine what magnitude of disruption would trigger the duty. As in most areas of the law (including the current approach to the impracticability doctrine), no precise line can be drawn. Still, some guidance is possible. Generally, the greater the disruption, the greater the likelihood that a duty to adjust will arise. For example, express provisions calling for an adjustment often require "gross inequities." In such situations, the parties would view performance of the contract without an adjustment as ultimately detrimental to both sides. Obviously, in many cases it will not serve the buyer's interests if the supplier is driven out of business or to bankruptcy and therefore cannot continue to supply the buyer.[69] The implied adjustment duty should be no less stringent. In fact, the potential harm to a party must approximate that of a party who historically has been excused from performance under the impracticability doctrine.[70] In such cases, the law correctly assumes that the parties did not allocate the particular risk to the promisor and that compelled performance according to the contract would neither reflect the parties' intent nor further any social values.[71] However, the circumstances that give rise to the supplier's reasonable expectation that the buyer will adjust may also give rise to a reasonable expectation on the part of the buyer that the supplier will also seek to preserve the relationship. Thus, the supplier may have a duty to adjust as well, rather than claim an excuse from all performance. The supplier's duty to adjust is especially likely to exist when the buyer has a substantial reliance interest in continued performance, such as when a utility builds a new power station in anticipation of a steady supply of fuel, or forgoes

68. *See* Hillman, *supra* note 64, at 625. Courts applying the foreseeability test must also determine whether a contingency was foreseeable. All commercial contingencies may be foreseeable to some extent; a more realistic question is *how* foreseeable was the occurrence. *See* Aluminum Co. of Am. (Alcoa) v. Essex Group, Inc., 499 F. Supp. 53, 70 (W.D. Pa. 1980) (the "proper question" is whether the parties believed an outcome was "highly unlikely"). The greater the foreseeability, the more likely the parties' price provision was intended to take care of the contingency. Because determining the extent of foreseeability requires difficult line drawing, one suspects that other factors often control the foreseeability determination. For example, a court may find that calamitous cost increases due to an oil boycott were unforeseeable, while less drastic increases were foreseeable. *See* Hillman, *supra* note 64, at 625.

69. *See supra* note 43.

70. Typically courts require close to a 100% increase in costs. *See* Hillman, *supra* note 64, at 652 nn.219-20.

71. *See, e.g., id.* at 650-55.

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other favorable supply opportunities, or makes commitments contingent on the supply of fuel.

The argument under the agreement model in favor of a good-faith duty to adjust in certain circumstances is thus based on the realities of business expectations. As such, the argument is vulnerable to the criticism that contract law should not necessarily reflect the "morals of the marketplace."[72] Certainly, patently unfair practices, such as a merchant's unconscionable behavior toward a consumer in adhesion contract situations, should be regulated. When, however, the parties' practices consist not of advantage-taking, but of sharing and cooperation, and both parties intended to incorporate such practices, enforcing the accepted mores should be encouraged.

In sum, a host of factors are pertinent to determining the parties' intentions with respect to adjustment. Extreme cases in which the parties' intentions are perfectly clear are rarely litigated. Courts face a challenge here in sorting out the cases, but the problem is not unlike other contract interpretation issues[73] and requires only close attention to the realities of business practice that define the parties' agreement. We should not concede defeat, therefore, by refusing to recognize a duty to adjust when the circumstances prove the existence of such a duty.

B. *The "Gap" Model.*

The principal justification for an adjustment duty under the agreement model derives from the principle of freedom of contract.[74] There is often a fine line, however, between enforcing the parties' intentions and

72. Richard Danzig suggests that the focus in article two of the UCC on reflecting commercial realities is a "renunciation of legislative responsibility and power." Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622 (1975). On the other hand, because commercial practices are the foundation on which the parties bargained, reliance on these practices leads to enforcement of the parties' true expectations and bars surprise. *See* Kirst, *supra* note 34, at 870 (consideration of trade usage and course of dealing provides some assurance that courts will consider actual dispute between parties); Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1106-07 (1965) (UCC uses "trade usage" to determine parties' probable intent); Llewellyn, *supra* note 42, at 722 n.45 (practice is the "base-line" for measuring parties' obligations). As one pre-UCC court stated: "[W]hen tradesmen say or write anything, they are perhaps without present thought on the subject, writing on top of a mass of habits or usages which they take as a matter of course." Nicoll v. Pittsvein Coal Co., 269 F. 968, 971 (2d Cir. 1920). In addition, while law remains fixed, trade practice is flexible and changing. Llewellyn, *supra* note 42, at 714.

73. *See* Hillman, *supra* note 64, at 623-27 (discussing courts' approaches to the problem of allocating risks not dealt with by the contract in order to determine whether a right of cessation exists).

74. Freedom of contract protects the parties' autonomy, and maximizes both the parties' and society's welfare. *See* E. FARNSWORTH, *supra* note 20, § 1.7, at 21; C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (1981); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933).

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judicial gap filling, especially when those intentions are gleaned from the circumstances rather than an express agreement. An independent justification exists, however, for an adjustment duty in some cases in which the evidence is insufficient to find an express or implied agreement to adjust.[75] The duty is based on the desirability of requiring the parties to share unallocated losses.[76]

The realities of planning[77] suggest that a particular risk, such as an oil embargo or runaway inflation, may be unallocated. If parties explicitly or implicitly agree not to deal with such a problem because it is too remote, too costly to provide for, or too likely to upset the deal, there is little reason based on the agreement for placing the risk solely on either party.[78] Although contracts are entered for the purpose of ensuring performance in an unpredictable future, reasonable parties often do not expect a promisor to act as an insurer by performing regardless of calamitous circumstances.[79] This is true even in contracts containing price-adjustment features, if these features are designed to deal only with a certain magnitude and species of risk.[80]

Suppose, for example, that unforeseen circumstances increase a supplier's costs of supplying a utility more than 100%, that the price-adjustment feature fails to keep pace, and that the supplier faces severe losses over the remaining term of the contract.[81] Suppose further that the supplier acted reasonably; the losses are not attributable to the supplier's own failure to bargain for an appropriate price formula, to stockpile in-

75. One court recognized the problem, stating that the " '[i]ntention of the parties' is a good formula by which to square doctrine with result. . . . [I]ntent . . . [when] discernable, must be followed; but a certain sophistication must be recognized" where changed circumstances, the passage of time, and an inexact contract are involved. Parev Prods. Co. v. I. Rokeach & Sons, Inc., 124 F.2d 147, 149 (2d Cir. 1941).

76. *See* Hillman, *supra* note 64, at 629-37, 650-55 (discussing the equities of cessation disputes).

77. *See supra* notes 21-29 and accompanying text.

78. *See* Speidel, *supra* note 4, at 393, 406.

79. *See, e.g.,* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 13.3, at 968 (1973); *see also* National Presto Indus., Inc. v. United States, 338 F.2d 99, 109-10 (Ct. Cl. 1964) (seller's acceptance of fixed-price contract did not suggest that all risks were allocated to it), *cert. denied,* 380 U.S. 962 (1965).

80. *See supra* notes 55-68 and accompanying text.

81. Some courts apparently have in part based their denial of relief to a supplier on the supplier's gains from the disruption in other areas. *See* Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 726 (Mo. Ct. App.), *cert. denied,* 444 U.S. 865 (1979) (trial court allowed evidence that seller experienced a threefold increase in the value of its coal reserves); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 140 (N.D. Iowa 1978) (supplier took advantage of "inflated market prices" in new contracts), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979), *cert. denied,* 445 U.S. 911 (1980). If the gains are unrelated to the particular contract, however, they should not bar relief to a supplier. For example, there is little reason why an increase in the market value of a supplier's reserves should be given, in effect, to the buyer by allocating to the supplier an otherwise unallocated risk.

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ventories, to expand its supply sources, or to use less expensive methods of production. In fact, suppose that the supplier's own sources of raw materials all insisted on short-term agreements only. Because the particular risk of cost increases was unforeseen and because the supplier acted reasonably and now faces calamitous losses, the situation appears ripe for supplier relief under UCC section 2-615.[82]

The effect of cessation on the utility also needs to be considered, however. The utility may have relied on a long-term supply of fuel by building a new power station, by failing to oppose a long-term rate structure based on preinflation prices,[83] or by forgoing other market opportunities.

The traditional approach to this problem is all or nothing: either the supplier is excused[84] or the utility is entitled to performance under the contract. Courts rarely favor the supplier in such cases. Instead, they retreat to a "finding" that the supplier promised to perform and therefore assumed the risk of even an oil embargo.[85] In reality, confronted with the adage that courts should not make contracts for the parties and with remedial inflexibility in the face of strong interests on

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82. U.C.C. § 2-615 (1977) provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

83. If the utility is able to pass on price increases to ratepayers and suffers no other harm (e.g., it did not build a new power station), the case may be ripe for a finding of impracticability in favor of the supplier. No strong utility interest compels adjustment in these circumstances. The effect would be that the utility would be required to purchase higher-priced fuel and consumers would pay more. Professor Birmingham discussed such an approach in an analogous situation involving increased costs of goods due to the Suez Canal closing. *See* Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 HASTINGS L.J. 1393, 1412-16 (1969).

84. Typically each party would be entitled to restitution of any benefit conferred. *See supra* note 3 and accompanying text.

85. *See supra* note 4 and accompanying text; *see also* Gillette, *supra* note 12, at 522-23. *But see* Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 486-87 (1985) (courts have recognized that risk of change in conditions should not always be allocated to the promisor).

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both sides, the court may simply opt for a facile solution.[86]

Does the all-or-nothing approach make sense? In a gap situation, where the parties' agreement does not justify a refusal to adjust and where both parties have strong contradictory interests, it would be better to recognize a duty to adjust and enforce the duty through appropriate remedies. First, an adjustment duty is even-handed. Both parties have significant interests worthy of protection in a situation in which there is little reason to favor either one completely.[87] An adjustment duty also avoids unexpected gain by one party at the cost of catastrophe for the other,[88] when neither is earned.[89] Moreover, an adjustment duty helps both parties ultimately to benefit from their contract.[90] Finally, in an atmosphere of flexibility and cooperation, an adjustment duty may reflect what the parties would have agreed to at the time of contracting had they addressed the problem of changed circumstances.[91]

II. Court Adjustment

Assuming the court finds a duty to adjust and the parties have failed to adjust, the question of fashioning an appropriate remedy confronts the court. When the buyer's bad faith is the cause of the failure to adjust,[92]

86. One critic aptly observed: "Dominated by our all-or-nothing notions of recovery, we have almost totally ignored what would appear in many situations to be the eminently sensible split-the-loss solution." Mueller, *Contract Remedies: Business Fact and Legal Fantasy,* 1967 Wis. L. Rev. 833, 837.

87. *See* Hillman, *supra* note 64, at 629-34, 650-55; Speidel, *supra* note 4, at 406. *See generally* Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason,* 58 Nw. U.L. Rev. 750 (1964) (discussing the prospect and appropriate limitations on the imposition of settlement on parties). A long-term contract can be viewed as a joint effort to enhance the wealth of both parties. When a disruption occurs, the parties should attempt to minimize the harm to each other and avoid returning to precontract adversarial positions. *See* Harrison, *A Case for Loss Sharing,* 56 S. Cal. L. Rev. 573, 586-87 (1983) (returning to adversarial positions "largely ignores the mutual reliance and consensual reciprocity inherent in contract").

88. Adjustment is therefore in accord with a norm emerging in contractual settings that one party "should not knowingly cause harm to another without justification." Hillman, *supra* note 64, at 619.

89. *See* Speidel, *supra* note 4, at 371, 405. It has been observed that "[t]he advantageous negotiating position of the party seeking enforcement seems particularly undeserved when the parties understood from the outset that flexibility was an integral part of their agreement." Comment, *Equitable Reformation of Long-Term Contracts—The "New Spirit" of* ALCOA, 1982 Utah L. Rev. 985, 1003.

90. Adjustment is therefore consistent with the contract norm of reciprocity. *See* Hillman, *supra* note 64, at 638-39.

91. *See supra* notes 21-29 and accompanying text. Professor Speidel points out that adjustment also protects third-party interests. Speidel, *supra* note 4, at 411-12.

92. Like most duties relying on implied terms such as good faith, it is easier to describe impermissible rather than permissible buyer conduct. *See, e.g.,* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 Va. L. Rev. 195, 201 (1968). The buyer, for example, may not refuse to negotiate at all except under unreasonable conditions,

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one approach would be to find that adjustment is an implied condition precedent to the supplier's performance and to excuse the supplier. Modeled after the general contract law approach to breaches of contract, this response would be appropriate whenever the buyer's particularly unreasonable response to the exigent circumstances casts doubt on the buyer's future satisfactory performance. Because determining whether the buyer is acting in bad faith will often be very difficult—requiring the court to weigh adjustment offers and other potentially ambiguous conduct of the parties—and because cessation is typically onerous and wasteful, the court should rarely excuse the supplier.

A less severe approach would be to order the parties to engage in good faith bargaining, mediation, or other dispute resolution techniques.[93] Such an order may prompt the parties to reach some reasonable agreement. If the parties still do not reach agreement, or if the court

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such as after a lengthy period of time during which the buyer reaps the benefit of market conditions. *See* Farnsworth, *On Not Getting to Yes: Fair Dealing in Precontractual Negotiations and Under Preliminary Agreements,* 87 COLUM. L. REV. (1987) (forthcoming). *See generally* Knapp, *Enforcing the Contract to Bargain,* 44 N.Y.U. L. REV. 673 (1969) (arguing that parties' preliminary negotiations may create contract to bargain which may be breached by later bad faith conduct); Speidel, *supra* note 4, at 414-16, 415 n.187 (discussing court's role where advantaged party fails to negotiate in good faith or refuses to accept equitable price adjustment). Nor may the buyer engage in negotiation only as a subterfuge to delay the supplier's termination of performance. Thus a continuous series of unreasonable adjustment offers—offers that would result in little or no improvement in the supplier's position—would be bad faith. *See id.* at 415 n.187. Consistent and immediate rejection of the supplier's proposals would underscore this finding, *see* Farnsworth, *supra,* as would windfall gains to the buyer during the "negotiation" period. Of course, a buyer's refusal to accept the supplier's own unreasonable adjustment offers would not be bad faith. *See* Speidel, *supra* note 4, at 412. Ultimately, the court must measure the parties' offers against its own view of what is fair adjustment. Evaluation whether the buyer is acting in bad faith, therefore, may depend on the court's ability to approximate a fair adjustment.

In addition, good faith also proscribes certain threats, such as threats to harm the supplier's business reputation by informing others of the supplier's unreliability. Nevertheless, courts should not dismember the bargaining power of a party. Thus, statements that the buyer will search for new sources in the future should not alone evidence bad faith and a breach of the duty to adjust.

93. *See infra* note 97. Much writing in the law reviews involves the proper roles of judges in fostering settlement. I will not enter the fray. My goal is to show that when all else fails, court adjustment should not be precluded. Articles discussing judicial methods of achieving settlement include Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility,* 53 F.R.D. 129 (1971); Lambros, *The Judge's Role in Fostering Voluntary Settlement,* 29 VILL. L. REV. 1363 (1984); Oesterle, *Dangers of Judge-Imposed Settlements,* LITIGATION, Spring 1983, at 29; Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982); Trakman, *supra* note 85; Wall, Schiller & Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediary Techniques,* 8 AM. J. TRIAL ADVOC. 83 (1984); *See also Symposium on Litigation Management,* 53 U. CHI. L. REV. 305 (1986).

Some courts are willing to enforce agreements to negotiate in good faith to enter a formal contract. *See, e.g.,* Arnold Palmer Golf Co. v. Fuqua Indus., Inc., 541 F.2d 584, 590 (6th Cir. 1976); Thompson v. Liquichimica of Am., Inc., 481 F. Supp. 365, 366 (S.D.N.Y. 1979); Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224, 238-39 (N.D. Ill. 1976); Itek Corp. v. Chicago Aerial Indus., Inc., 248 A.2d 625, 629 (Del. 1968).

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believes such an approach would be fruitless,[94] a third approach would be for the court itself to adjust the contract.[95]

I do not dispute the proposition that a court is far from ideally suited to adjust long-term contracts. Litigation costs time and money and a judge can rarely make a better contract for the parties than they could make for themselves.[96] This does not mean, however, that courts should not be allowed to adjust long-term contracts of parties who cannot privately resolve their dispute. Rather, the shortcomings of court adjustment only serve to emphasize that courts should be creative in encouraging the parties to settle.[97] The discussion in this section, however, assumes the court has failed to induce private settlement. In short, we now confront the hard question: Is court adjustment ever appropriate when the parties cannot reach agreement themselves?

A. *Judicial Standards for Adjusting Long-Term Contracts.*

Professor Dawson opposed court adjustment of long-term contracts because he believed that courts lack sufficient standards to reshape the contract to reflect what the parties should have agreed to ex post or what they would have agreed to ex ante. In the absence of standards, the argu-

94. The attempt in Germany to create inducements for parties to renegotiate terms apparently produced only delay or litigation over the fairness of proposals and the "obduracy" of responses. Dawson, *supra* note 7, at 29-30.

95. For an analysis and evaluation of various methods of court adjustment, see *infra* notes 98-166 and accompanying text.

The range of potential facts in long-term supply contracts and the range of possible court responses (termination, adjustment, or specific performance) are not unlike a related cessation problem—that of the rights of an injured party after a breach. *See* Hillman, *supra* note 64, at 655-57. The Second Restatement of Contracts offers a set of guidelines for determining when an injured party must continue performing despite a breach, when an injured party may appropriately suspend performance, and when an injured party may cancel the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 241-242 (1979). The Restatement's response to that problem is informative because it illustrates the difficulty of drawing sharp lines in contract law and the need to offer the courts a range of responses to reach sensible results.

96. Dawson, *supra* note 7, at 36. But Professor Dawson conceded that parties are unlikely to adjust voluntarily after initial breakdown. *Id.* at 29-30 (German experience indicated that many parties lacked incentive to renegotiate in inflationary period).

97. Such procedures include a judicial "suggestion" that the parties negotiate in good faith or engage in extrajudicial dispute resolution processes such as mediation or a nonbinding mini-trial. *See* FED. R. CIV. P. 16(c); *see also supra* note 93 and accompanying text. In addition, Federal Rule 53 and similar state enactments authorize the court to refer the case or any part of it to an impartial person such as a special master. *See generally* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 38, at 544-45.

Although an analysis of these and other procedures is beyond the scope of this article, I offer one comment. Court efforts to induce settlement in the long-term contract setting should be immune from the criticism that parties are deprived of their day in court. *See* Resnik, *supra* note 93. Because parties to long-term contracts typically expect cooperation and settlement of problems, inducing settlement only helps the parties to do what they believe they should have done themselves.

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ment goes, a court enjoys unbounded discretion to create a new contract for the parties.[98]

Even Professor Dawson conceded that court adjustment may be appropriate when the court does no more than extend party-agreed standards found in their contract.[99] For example, he conceded that cases involving partial excuse of installment contracts[100] and cases involving reformation of the price of land sale contracts where the parties were mistaken as to how many acres were sold[101] are examples of proper court adjustment. Thus, Professor Dawson would limit court adjustment to situations in which the existing contract offers sufficient guidance to permit an adjustment that reflects the parties' reasonable expectations.

Although party-agreed standards in long-term contracts often offer only an imperfect guide to expectations—after all, the parties typically expect flexibility and cooperation and may have had no expectations at all with respect to the current circumstances—the situation is far from hopeless.[102] The goal of court adjustment is to preserve the parties' pur-

98. *See, e.g.*, D. DOBBS, *supra* note 79, § 13.3, at 972.

99. *See, e.g.*, Dawson, *supra* note 7, at 4-23, 35. In fact, Professor Dawson also conceded that, in the face of catastrophe, such as the uncontrolled inflation experienced by Germany in the 1920's, court adjustment is appropriate even without clear standards. *Id.* at 1-2.

100. *See, e.g.*, *id.* at 4-9. Professor Dawson, however, emphasized the limited nature of this adjustment:

> When the *Second Restatement* speaks of courts granting remedies, where frustration has occurred, on terms "such as justice requires," it offers illustrations [that] all involve a performance whose insufficiency has been excused by some unforeseen event, with a residue left that complies with the contract and will produce a result that is desired and useful. In such cases what "justice requires" is that the performance or action of the other party be scaled down or postponed and in all these cases if scaling down occurs it is accomplished with a formula that was an agreed term in the original contract. To cancel the entire transaction when these tests are met clearly would be unnecessary and wasteful; but partial enforcement on such "terms" is far indeed from the pursuit of an ephemeral equity that is now advocated by some authors, with the aim of manufacturing terms that are truly new because new circumstances would make them seem more just. For those who urge courts to take on such missions the *Second Restatement*, I would say, offers no comfort at all.

Id. at 8-9.

101. *Id.* at 9-11. Professor Dawson also discussed cases in which a promisor did more than required under the original contract, such as where a shipper took a longer route because hostilities blocked the usual route. *Id.* at 13-17.

102. National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965), is often trotted out to support court adjustment. Professor Dawson referred to the case as "incredible," but primarily for its finding on risk allocation. Dawson, *supra* note 7, at 18-21. Regardless of the merits of that case, judicial authority in favor of adjustment concededly is still weak in this country; one can, however, find at least some recent allusions to the possibility. *See supra* note 5.

Some courts in other areas grant specific performance after supplying missing terms. For example, in Ammerman v. City Stores Co., 394 F.2d 950 (D.C. Cir. 1968), the court granted specific performance of an option to lease space to a major department store in a shopping center, *id.* at 956, despite a lack of agreement on amount of space, cost per square foot, design, and other important terms. *See* City Stores Co. v. Ammerman, 266 F. Supp. 766, 771 (D.D.C. 1967). The court referred to the leases of other major stores in the same mall to fill the gaps. *Ammerman*, 394 F.2d at 956. As

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poses and to avoid unbargained-for gains by one party or losses by the other. In situations ripe for adjustment,[103] the supplier sought an assured market and cost coverage and the buyer sought an assured supply at a reasonable price.[104] The parties did not intend to permit the supplier to raise prices without a corresponding increase in its costs. Similarly, the parties did not intend to permit the buyer to take advantage of an exigent market situation by raising its own prices to third parties (such as a utility increasing its rates or spot selling on the market), while at the same time insisting on the supplier's performance at preinflation prices.[105]

Within these broad parameters, more concrete guidance may be available to help a court adjust the contract. For example, a court could refer to other similar supply contracts formulated or adjusted under cur-

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support, the court cited Morris v. Ballard, 16 F.2d 175, 176 (D.C. Cir. 1926) (holding option to buy realty enforceable though terms were to be agreed upon subsequently); Phillips Petroleum Co. v. Buster, 241 F.2d 178, 183 (10th Cir.) (enforcing agreement to supply "reasonable" quantity of gas at "reasonable" price), *cert. denied,* 355 U.S. 816 (1957); and Shoemaker v. American Sec. & Trust Co., 163 F.2d 585, 588 (D.C. Cir. 1947) (implementing intent of testatrix when explicit terms of will became impracticable). *See also* McLouth Steel Corp. v. Jewell Coal & Coke Co., 570 F.2d 594, 608-09 (6th Cir.) (enforcing requirements contract and supplying term stating maximum amount to be demanded), *cert. dismissed,* 439 U.S. 801 (1978); Mitchell-Huntley Cotton Co. v. Waldrep, 377 F. Supp. 1215, 1219 (N.D. Ala. 1974) (supplying term stating time for ginning cotton by resort to industry practice); Hall v. Weatherford, 32 Ariz. 370, 379-80, 259 P. 282, 285-86 (1927) (enforcing renewal clause where rent was to be fixed by subsequent agreement); Young v. Nelson, 121 Wash. 285, 291-92, 209 P. 515, 517 (1922) (same); D. DOBBS, *supra* note 79, § 12.22, at 907-10 (discussing specific performance for contractor's breach of building or repair contract); Van Hecke, *Changing Emphases in Specific Performance,* 40 N.C.L. REV. 1, 13-16 (1961) (suggesting that "arbitration [may] be resorted to as a means of bypassing the traditional inhibitions upon equitable specific performance in building and construction contracts"). *But see* North Am. Fin. Group, Ltd. v. S.M.R. Enters., Inc., 583 F. Supp. 691, 699 (N.D. Ill. 1984) (refusing to enforce personal services contract on public policy grounds); Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 110-11, 417 N.E.2d 541, 544, 436 N.Y.S.2d 247, 250 (1981) (refusing to enforce rent renewal clause on ground that it was too indefinite).

103. *See supra* Part I.

104. *See* Goldberg, *supra* note 18, at 531; *supra* note 26 and accompanying text.

105. In North Cent. Airlines v. Continental Oil Co., 574 F.2d 582 (D.C. Cir. 1978), the court reached a solution consistent with the parties' goals. There, the parties to a jet fuel supply contract included a price-adjustment feature based on the "posted price" of crude oil, the material from which jet fuel is refined. *Id.* at 584. Increases in the posted price of the crude oil caused a proportional increase in the price of jet fuel. When the adjustment term failed due to the imposition of government price controls on crude oil that created two-tier pricing, one for "old" and one for "new" oil, and thereby created two potential posted prices, the court concluded that the agreement now had an open price term under UCC section 2-305(1)(c). *Id.* at 592-93. The court stated that the price should be based on the parties' intention "to establish an escalation clause which would pass through some of the costs of the raw material by increasing the price of the refined product in a definite relationship to any increase in the posted price of certain crude oil." *Id.* at 593. It added that the "underlying principle" was that "the price should be related to the underlying cost of crude oil." *Id.* It therefore suggested that on remand the district court should set the price of jet fuel based on the composition of old and new oil and the posted price for each. *Id.*

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rent conditions by the supplier or other contracting parties to determine an appropriate pricing formula.[106] Such models should not be difficult to find. For example, all but two utilities agreed to adjust when a coal supplier recently requested relief from over forty utilities.[107] A court also has the benefit of any party documents or statements concerning the purpose of cost-adjustment features in the contract. For example, if the adjustment provision was intended to ensure coverage of the supplier's costs plus a certain profit, a court could adjust the contract to ensure such a result.[108] A court could also apportion allocated and unallocated risks. If an oil embargo and safety regulations both cause a cost increase but the parties allocated the latter risk to the supplier, the adjustment should reflect only the former cause of the increase.[109] Finally, a court could refer to any settlement offers made by the parties.[110]

Instead of focusing on the parties' expectations, a court could employ a restitutionary theory and base adjustment on the buyer's windfall. Of course, the court must consider the parties' contract expectations when deciding which gains are a windfall to the buyer. In some situations this may not be too difficult. For example, in *Alcoa*, the parties did

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106. When courts believe the parties intended to contract, they unhesitatingly fill price gaps in one of the following ways: (1) by referring to the market price as determined by the price the seller was selling to others during the relevant time, *see* Pulprint, Inc. v. Louisiana-Pacific Corp., 124 Misc. 2d 728, 731, 477 N.Y.S.2d 540, 543 (Sup. Ct. 1984); (2) by referring to the market price as determined by the price generally applicable in the market area, *see* D.R. Curtis, Co. v. Mathews, 103 Idaho 776, 779, 653 P.2d 1188, 1191 (Ct. App. 1982); (3) by referring to a reasonable price determined within the context of the whole agreement package, not necessarily limited to a prevailing industry price or to seller markup to others in the trade, *see* Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 217-18 (5th Cir. 1975); North Cent. Airlines v. Continental Oil Co., 574 F.2d 582, 588 (D.C. Cir. 1978); (4) by referring to trade publication price ranges, *see* TCP Indus., Inc. v. Uniroyal, Inc., 661 F.2d 542, 548-49 (6th Cir. 1981); or (5) by referring to course of dealing and usage of trade under UCC sections 1-201(3) and 1-205, *see* Columbus Milk Producers' Coop. v. Department of Agric., 48 Wis. 2d 451, 460-61, 180 N.W.2d 617, 621-22 (1970).

107. *See supra* note 43 and accompanying text.

108. In Aluminum Co. of Am. (Alcoa) v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), for example, the court found that the parties intended that Alcoa make a profit of between one and four cents per pound. *Id.* at 58. A deficiency of cost-plus pricing is that it "gives the seller poorer incentives to control costs, and requires that the parties devote more resources to monitoring performance." Goldberg, *supra* note 18, at 533.

109. Of course, this may be too difficult to prove in some cases. *See, e.g.*, Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 135 (N.D. Iowa 1978) (refusing to adjust contract price where impossible to determine share of increase attributable to unforeseen conditions), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

110. For example, in Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979), the coal supplier proposed a coal price of $10.60 per ton and new price adjustment features including a gross inequity clause at a time that coal was selling for $17.00 on the market and the buyer was paying $7.83 per ton under the contract. The buyer countered with an offer of an increase of $1.00 per ton. Brief for Peabody Coal Co., *supra* note 43, at 23, 24.

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not contemplate that Essex would spot-sell aluminum on the market.[111] When Alcoa's costs increased, however, and the market price of aluminum dramatically rose, Essex began to do just that.[112] Arguably, all of Essex's gain from such conduct was unjust enrichment. The problem with a restitutionary approach, however, is that it would be difficult to adjust the contract to account not only for the realized unjust gain, but also for the future market fluctuations and other uncertainties that may favor the supplier.[113]

A less ambitious approach would be to base adjustment on a reliance theory modeled after the judicial response to the problem of terminable-at-will franchise agreements. Some courts have held that terminating a franchise agreement of indefinite duration is wrongful if the franchisee has not had reasonable time to recoup its investment.[114] Although the franchisee's remedy is often limited to damages,[115] some courts enjoin such wrongful terminations.[116] Similarly, a court could enjoin a supplier from ceasing a long-term supply contract until the buyer

111. *Alcoa,* 499 F. Supp. at 58.

112. *Id.* at 59.

113. *See* G. PALMER, THE LAW OF RESTITUTION, § 13.9, at 56-61 (1978) (advocating adjustment based on facts at hand, not on fixed formula, that would approximate the exchange the parties originally had in mind).

114. *See, e.g.,* Arnott v. American Oil Co., 609 F.2d 873, 882-83 (8th Cir. 1979) (franchise relationship imposes duty not to terminate arbitrarily), *cert. denied,* 446 U.S. 918 (1980); Clausen & Sons, Inc. v. Theodore Hamm Brewing Co., 395 F.2d 388, 390-91 (8th Cir. 1968) (13 years may be reasonable time to recoup investment); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 372-74, 294 A.2d 253, 261-62 (1972) (decision to terminate franchise depends on reasonable expectations of parties), *modified,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 381, 390 A.2d 736, 743 (1978) (company could not arbitrarily terminate franchise agreement); Straup v. Times Herald, 283 Pa. Super. 58, 73-74, 423 A.2d 713, 720-21 (1981) (corporation not allowed to violate franchisee's reasonable expectations by terminating relationship).

115. The typical remedy is damages because specific performance would require "constant scrutiny," *see* Bach v. Friden Calculating Mach. Co., 155 F.2d 361, 366 (6th Cir. 1946), or because money damages are adequate. *See* J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 496 (N.D. Cal. 1954).

116. The courts that enjoin franchise terminations usually do so on the basis of public policy, a statute, or both. *See, e.g.,* California ARCO Distribs., Inc. v. Atlantic Richfield Co., 158 Cal. App. 3d 349, 366, 204 Cal. Rptr. 743, 755 (1984) (remanding for determination whether unilateral modifications made by franchisor to franchise agreement warrant issuance of injunction under Petroleum Marketing Practices Act); Mercedes-Benz of N. Am., Inc. v. Department of Motor Vehicles, 455 So. 2d 404, 410 (Fla. Dist. Ct. App. 1984) (affirming permanent injunction against franchisor who failed to reply within statutory period to franchisee's proposal to transfer franchise; the statute was aimed at correcting the "unequal bargaining power between franchisors and franchisees"), *review denied,* 462 So. 2d 1107 (Fla. 1985); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 375-76, 294 A.2d 253, 263 (1972) (finding terminable-at-will franchise agreements to be void as against public policy), *modified,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974). Some courts, however, base their decision on estoppel. *See, e.g.,* Straup v. Times Herald, 283 Pa. Super. 58, 71-74, 423 A.2d 713, 720-21 (1980) (newspaper estopped from terminating distributorships at will where distributors detrimentally relied on newspaper's contrary representations); Gambar Enters., Inc. v. Kelly Servs.,

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had reasonable time to recoup its reasonable reliance expenses. Court adjustment would be limited to the contract's duration term.

A concrete example helps to illustrate what buyer recoupment might entail.[117] Consider a utility that constructed a new power plant in reliance upon a continuous supply of coal under a long-term contract. The price of coal rises dramatically, the supplier refuses to deliver, and the parties litigate. A court adjusting the contract should grant the utility sufficient time to obtain an alternative source of supply for the plant at a price reflecting current conditions, or if an alternative source is not available, sufficient time to recover the costs of constructing the plant. Thus, although recoupment sometimes may require a lengthy duration, one should recall that in precisely such situations—i.e., costly buyer reliance on a long-term supply contract—the supplier typically would get *no* relief under current law.[118]

When the court bases adjustment on buyer recoupment, it could also take into account the buyer's other contract commitments. For example, if a utility agreed to a rate structure in reliance upon a supply contract, the contract should continue long enough to enable the utility to honor its commitments without a loss. Of course, the likelihood that the buyer itself could obtain an adjustment of its commitments also should be considered; for example, whether a utility could pass on cost increases to ratepayers affects its true reliance on the contract.[119]

Like the expectation and restitutionary approaches to the problem of adjustment, recoupment challenges the courts. Still, recoupment simplifies the problem. It requires no new pricing formula that may fail to reflect unanticipated future changes of conditions over a potentially long period of time. Instead, recoupment alleviates the harshness to the buyer of immediate termination, while it simultaneously acknowledges the supplier's legitimate interests in cessation of the contract.

Alternatively, a court could base adjustment on recoupment, but instead of ordering specific performance of the contract for a limited dura-

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Inc., 69 A.D.2d 297, 305, 418 N.Y.S.2d 818, 823 (1979) (bad faith termination sufficient to sustain cause of action).

117. In the franchise termination setting, courts typically award damages based on reasonable expenses required or encouraged by the franchisor prior to a reasonable time after notice of the termination, less profits earned. *See, e.g.*, Schultz v. Onan Corp., 737 F.2d 339, 349 (3d Cir. 1984). The franchisee often cannot recover lost future profits. *See, e.g.*, *id.*; *see also* W.K.T. Distrib. Co. v. Sharp Elecs. Corp., 746 F.2d 1333, 1336 (8th Cir. 1984) (recovery of lost profits denied on ground that recoupment is equitable doctrine intended to restore franchisee's lost investment). *But cf.* Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759, 763 (2d Cir. 1964) (wrongfully terminated sales agent awarded recoupment, including compensation for money and effort invested to build the company's business, for underpayment of commissions, and for lost sales commissions).

118. *See supra* notes 84-86 and accompanying text.

119. *See supra* note 83 and accompanying text.

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tion, the court could calculate a payment by the supplier necessary to "buy-out" the contract.[120] Although a court that has declared a contract impracticable typically awards the buyer only restitution for any benefit conferred on the supplier, the cash payment to the buyer could be based on the buyer's reasonable reliance expenses. Such expenses would include, for example, losses associated with constructing a new power plant or with agreeing to a fixed rate structure that cannot be recouped.[121] This approach would require the court to calculate a precise money figure. For this reason, it is less attractive than limiting the contract duration; the latter approach allows the court to "hedge" with respect to the ultimate matter of dollars and cents.[122]

B. *Judicial Competence to Adjust Long-Term Contracts.*

Some commentators argue that adjusting long-term contracts, which requires determining whether risks were allocated, understanding and applying complex accounting data, and foreseeing the future, is simply too complex for judges. These commentators believe that judges lack both the parties' expertise concerning the subject matter and prior training or experience in creating contract terms.[123] The argument is not overly persuasive. The problem of complex cases is not unique to the performance of long-term contracts. Consider, for example, the substantive and remedial complexities of securities, patent, and antitrust cases. The judicial incompetence argument casts doubt on our entire judicial

120. This is in accord with some of the franchise termination cases. *See supra* notes 115, 117 and accompanying text; *see also* Sunflower Elec. Coop., Inc. v. Tomlinson Oil Co., 7 Kan. App. 2d 131, 144-46, 638 P.2d 963, 974 (1981) (seller liable only for 4 of 15 years of contract because price was to be "renegotiated," making additional damages speculative).

121. *See supra* notes 117-19 and accompanying text. The reliance interest is rarely protected in excuse cases. *See* Harrison, *supra* note 87, at 581; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 272(2) (1979). *But see* Angus v. Scully, 176 Mass. 357, 359, 57 N.E. 674, 674 (1900) (performing party not at fault can recover for all work done when excused from performance). Instead, courts have awarded only restitution for benefit conferred. 6 A. CORBIN, CORBIN ON CONTRACTS §§ 1367-1372 (1962 & Supp. 1984); Harrison, *supra* note 87, at 581.

Professor Harrison suggests splitting essential reliance losses. *Id.* at 592-601. But his analysis is not focused on the long-term supply setting and problems of increased cost of performance.

122. Another approach is loss splitting. *See* D. DOBBS, *supra* note 79, § 4.5, at 268-69; Coons, *supra* note 87, at 766; Sharp, *Promissory Liability. II*, 7 U. CHI. L. REV. 250, 269 (1940); Comment, *supra* note 3, at 1056. For example, if a contractor spends $800 in reliance on a $10,000 contract to build a garage, all of which is unsalvageable, and then the property is condemned, the owner could reimburse the contractor for half of the reliance loss. A similar approach was adopted in National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965). The case is criticized in Dawson, *supra* note 7, at 18-21. Loss splitting seems viable for short-term agreements, but would be difficult to administer in long-term supply contexts. For example, assuming the supplier is excused, an issue arises whether the supplier's savings in not having to perform over the duration of the agreement should be considered along with the buyer's reliance losses.

123. *See, e.g.*, Dawson, *supra* note 7, at 17-18.

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system. Furthermore, the argument erroneously impugns all judicial adjustment, and overlooks the practicality of a modest adjustment such as specific performance for a limited duration or a cash buy-out designed to recoup the buyer's reliance expense.[124]

Doubtful also is whether alternative dispute resolution forums (or, in extreme cases, the legislature) would be superior to judicial adjustment.[125] Alternative dispute resolvers such as arbitrators or neutral third parties are not inherently better qualified to resolve adjustment problems.[126] Nor is the problem suited for a legislative solution. In precisely such a problem as this, flexible approaches are needed, approaches that are geared to the particular facts and to the parties' idiosyncratic interests.[127]

Commentators also ignore, or unfairly malign,[128] the fact that a judge has the benefit of hindsight. Hindsight provides judges with accurate, current information that not only helps them to adjust the contract to reflect present conditions, but also provides clues as to the likelihood of future events. In addition, a judge can turn to special masters, magistrates, expert witnesses, and the parties and their lawyers for help in crystallizing the potential remedies.[129] With such aid, a judge should be able to reform the contract to reflect the parties' goals under new circumstances.

Furthermore, even if a judge opts for a price adjustment rather than a more modest approach, adjustment does not require the judge to alter the fundamental nature of the parties' long-term agreement. Realistically, the agreement will continue to require flexibility and cooperation,

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124. *See supra* notes 114-22 and accompanying text.

125. *Cf.* Van Hecke, *supra* note 102, at 13-16.

126. For example, an "expert" arbitrator may be biased, or someone who is not an expert at all may be picked to arbitrate. In addition, some of the informalities of arbitration may contribute to an inequitable result. For example, arbitrators are free to dispense with formal rules of evidence, *see* COMMERCIAL ARBITRATION RULES Rule 31 (American Arbitration Association 1980), the discovery provisions of the Federal Rules of Civil Procedure, *see, e.g.*, Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9, 11 (E.D. Pa. 1960), the doctrine of stare decisis as to previous arbitration decisions, *see* M. HILL & A. SINICROPI, EVIDENCE IN ARBITRATION 1 (1980), and even substantive principles of law. *See* M. DOMKE, COMMERCIAL ARBITRATION § 25:01, at 391 (rev. ed. 1984). For a discussion of some of the shortcomings of arbitration, see Scott, *supra* note 18, at 139. Although only anecdotal evidence, my experience as an arbitrator supports the assertions made in this footnote.

127. *See* Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302,* 67 CORNELL L. REV. 1, 29 (1982).

128. *See, e.g.*, Dawson, *supra* note 7, at 36-37.

129. For example, the court can require the parties to assist it in fashioning relief by submitting proposed orders and supporting briefs. In one case involving a covenant not to compete, the court did just that. *See* Westec Sec. Servs., Inc. v. Westinghouse Elec. Corp., 538 F. Supp. 108, 127 (E.D. Pa. 1982). The court first prodded the parties to "make every effort" to reach an agreement on the order. *Id.*

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and the new, judicially prescribed price formula may even require additional adjustment as circumstances change. In short, judges cannot do more than the parties could do in allocating future risks, but judges should do what can be done. Otherwise, the supplier suffers the entire loss in a situation in which the parties agreed to adjust (the agreement model) or in which there is little reason for placing the entire loss on either party and fairness calls for sharing (the gap model).[130]

C. *Judicial Adjustment as a Restriction of the Parties' Autonomy.*

Critics also argue that court adjustment restricts the parties' autonomy and, in effect, remakes the contract for the parties.[131] But assume that a court *can* approximate the adjustment the parties should have made.[132] Under the agreement model, the parties reasonably expect adjustment; court adjustment is therefore a form of specific performance that supports, rather than defeats, the parties' expectations.[133]

Similarly, court adjustment under the gap model does not impinge on the parties' freedom because the parties have created no law to govern their rights and duties. A buyer could, of course, enter a contract in which the supplier expressly insures performance regardless of the circumstances. Or the supplier could expressly provide for release from the contract under onerous circumstances (for example, when costs are equal to or greater than the contract price). In such cases, ignoring the contract allocation of risk would impinge on freedom of contract. But if such an agreement was not made, neither party is contractually entitled to any particular resolution of the problem when an unallocated risk arises. Nevertheless, because the parties are joined in an enterprise that encourages reliance and creates expectations, neither party should have the unilateral right to insist on performance or to walk away from the deal.[134] Of course, the parties are free after contract breakdown to agree on a new approach to govern their affairs. The parties' failure to set their own agenda at that time or at the time of initial contracting constitutes

130. Professor Schwartz has argued that the issues in impracticability cases are too difficult for judges. *See* Schwartz, *Sales Law and Inflations,* 50 S. CAL. L. REV. 1, 12, 19-20 (1976). But if the issues are too complex for determining whether a supplier should be excused, they are also too complex for determining whether the buyer is entitled to performance.

131. *See* Dawson, *supra* note 7, at 18 ("If the contract that was previously in force has through frustration ceased to exist, how can the parties to it be compelled to accept a 'contract' that is manufactured by a court to replace it?").

132. *See supra* notes 98-130 and accompanying text.

133. *See* Goetz & Scott, *supra* note 30, at 317-20.

134. *See* C. FRIED, *supra* note 74, at 21-22, 72 (contracting parties have limited obligation to share losses caused by unexpected events); *see also* Coons, *supra* note 87, at 772-73 (losses by one party which are not coupled with gain to the other party should be shared where both parties are innocent of wrongdoing and occurrence is unanticipated).

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implicit consent to the court's intervention to adjust the agreement for them.[135]

Although classical contract law typically decides cases involving assertions of impracticability in an all-or-nothing fashion, it does not follow that a supplier or buyer in a true gap situation has the right to such a determination. Because of informal planning or loose drafting and because of the lack of clarity of contract rules on the subject (When is a risk foreseeable? When is performance impractical?), most true gap cases do not fit neatly on one side of the impracticability line. In fact, one suspects that in gap cases the issue of whether a supplier has a "right" to cease performing or the buyer a "right" to specific performance turns on the court's determination of whether the supplier would be hurt badly enough by performance.[136] To argue that the supplier or buyer has a "right" to a release or to performance, then, hinges upon a largely unsupportable belief in the clarity of contract rules in the true gap setting.[137]

A related argument against court adjustment is that it forces parties to perform in an unhappy marriage that would be better terminated. Parties in litigation have demonstrated their inability to perform without a costly breakdown, the argument goes, and it is therefore unlikely that they would do better in the future even under a more equitable arrangement. Limiting adjustment to the duration term reflects this concern and minimizes this problem. But if a court does opt to adjust the price, thus removing an inequity in the agreement, perhaps the parties *will* do better. In addition, the buyer need not be forced to perform under the adjusted regime. The court could grant the buyer specific performance, conditioned on the buyer's acceptance of the adjustment.[138] Thus the buyer

135. In Goetz & Scott, *supra* note 30, at 317, the authors refer to "indeterminate formulations" in relational contracts, which "implicitly instruct the dispute-resolver to construe the contract equitably."

136. *See* Hillman, *supra* note 64, at 652.

137. Professor Dawson complained that neither the *Alcoa* case nor Professor Speidel indicated precisely when court adjustment was appropriate. *See* Dawson, *supra* note 7, at 31. My view, derived from the reasoning in the text, is that such precision is impossible, at least within the gap model. Under that model, one can say only that court adjustment is appropriate when a serious disruption would cause the supplier calamitous losses, and, at the same time, the buyer asserts strong interests in continued performance. *See supra* notes 81-91 and accompanying text; *see also* Hillman, *supra* note 64, at 650-55.

138. *See* Dawson, *supra* note 7, at 32-33 (conditional decree is an "expedient with old and respectable credentials"); Speidel, *supra* note 4, at 417 (conditional grant of specific performance is the "most direct and least offensive" approach); *see also* Wooster Republican Printing Co. v. Channel 17, Inc., 533 F. Supp. 601, 621-22 (W.D. Mo. 1981) (ordering specific performance where performance was not impossible and buyer was willing to accept less than full performance), *aff'd*, 682 F.2d 165 (8th Cir. 1982); Humble Oil & Ref. Co. v. DeLoache, 297 F. Supp. 647, 656 (D.S.C. 1969) (granting specific performance where plaintiff agreed to reform of lease option); U.C.C. § 2-716(2) (1977) ("The decree for specific performance may include such terms and conditions . . . as the court may deem just.").

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would have the choice to either end the deal or accept performance of the adjusted contract. The supplier should not be heard to complain if the buyer chooses specific performance because the adjustment would largely obviate the supplier's reasons for seeking a release in the first place.

Ultimately, the criticism that court adjustment is an impermissible interference into the parties' freedom of contract fails to recognize that courts under current doctrine often "make" contracts for the parties. The UCC, for example, sets forth statutory gap-fillers,[139] instructs the courts to carve up unconscionable contracts,[140] and authorizes orders of specific performance under terms the court views as "just."[141] In fact, a UCC comment authorizes precisely the approach suggested in this article.[142] In addition, courts, using their equity powers, have a tradition of adjusting contracts. For example, courts have long whittled away at covenants not to compete, adjusting the duration, area, and substance of such promises.[143]

D. *Is Court Adjustment Bad Policy?*

Is court adjustment an unsound approach on policy grounds? For example, will it increase the cost of contracting (i.e., will it be inefficient)? Will it promote disputes? Will it decrease the number of settlements of disputes prior to or during litigation? Will it promote unfairness?

It is unlikely that the world is going to change very much from the limited recognition of an adjustment duty and from some remedial flexibility in the face of a party's unwillingness to adjust when the duty arises. First, the change of approach is modest. The duty to adjust would arise in few cases,[144] and the remedy need not be dramatic.[145] In addition, in

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139. *E.g.*, U.C.C. §§ 2-308, 2-309 (1977).

140. *Id.* § 2-302(1).

141. *Id.* § 2-716(2).

142. *Id.* § 2-615 comment 6 ("In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment under the various provisions of this Article is necessary . . . ."). *See also* Haley, *UCC § 2-615: Sharp Inflationary Increases in Cost as Excuse From Performance of Contract*, 50 NOTRE DAME LAW. 297, 307-08 (1974) (many situations exist "which are not quite so extreme as to constitute grounds for excuse but where commercial standards and good faith require price adjustment"). For a history of the drafting of section 2-615, see Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75, 77 (1974) (suggesting that drafter sought to protect sellers through an "exemption" that had become a "normal assumption" in commercial practice).

143. *See, e.g.*, Westec Sec. Servs., Inc. v. Westinghouse Elec. Corp., 538 F. Supp. 108, 126 (E.D. Pa. 1982) (reducing duration of covenant to 10 years, which was deemed a reasonable period for protection of plaintiff); Karpinski v. Ingrasci, 28 N.Y.2d 45, 50-52, 268 N.E.2d 751, 754-55, 320 N.Y.S.2d 1, 5-7 (1971) (striking out contract restriction that defendant oral surgeon not practice dentistry, where original restriction prevented defendant from practicing "dentistry and/or oral surgery").

144. *See supra* notes 17-73 and accompanying text.

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circumstances in which such a duty may arise, the parties could easily avoid it by clear contract drafting.

Second, parties to long-term contracts frequently pay little attention to contract rules.[146] Instead, extralegal factors such as the need to preserve the relationship or avoid the costs and delays of litigation control the parties' conduct.[147] It is therefore unlikely that any adjustment rule will have much effect on future behavior of the parties.[148] They simply will continue doing what they have been doing.[149]

Third, to the extent that a modest adjustment regime has any effect on the cost of contracting, that effect arguably will be salutary. The now familiar efficiency argument maintains that the "superior risk bearer" should suffer an unallocated loss, because the parties would have placed the loss on that party had they allocated it.[150] Because it reflects what the parties would have done, such an approach saves transaction costs—future parties will not have to negotiate and draft around a different rule—and therefore promotes allocative efficiency.[151] The superior risk bearer is the party who is better able to insure against the risk and who has greater information, knowledge, and experience in the particular area.[152] This party is in the best position to avoid the loss or insure against it.[153]

This efficiency theory does not apply to the agreement model because there is no gap to fill. Based on the parties' intentions, the agreement includes an implied adjustment duty. Under the gap model, the contract does not allocate the risk of the unforeseen event and does not

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145. *See supra* notes 114-22 and accompanying text.

146. *See, e.g.,* White, *Contract Law in Modern Commercial Transactions: An Artifact of Twentieth Century Business Life?,* LAW QUADRANGLE NOTES, Spring 1983, at 23.

147. *See* Harris & Veljanovski, *Remedies Under Contract Law: Designing Rules to Facilitate Out-of-Court Settlements,* 5 LAW & POL'Y Q. 97, 107-09 (1983).

148. *See* Whitford, *supra* note 13, at 551-52.

149. The seminal work on this point is Macaulay, *Non-Contractual Relations, supra* note 24. *See also* Palay, *supra* note 22, at 563 (parties sometimes protect themselves by developing a "private ordering" of rules for maintaining an agreement); Palay, *supra* note 44, at 276-77 (parties often alter contracts through unenforceable private agreements).

150. *See* Speidel, *supra* note 4, at 381-85.

151. *See, e.g.,* Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83, 97-108 (1977).

152. *See id.* at 90. But the facts of the *Alcoa* case suggest that identifying the party may be impossible. *See supra* notes 55-63 and accompanying text. Both Alcoa and Essex were huge industrial enterprises with sophisticated managements. Both planned extensively for the deal. Which is the superior risk bearer?

153. *See* Harrison, *supra* note 87, at 574. Obviously this approach may be criticized on many grounds. *See, e.g.,* Speidel, *supra* note 4, at 396-400 (discussing limitations of efficiency analysis). *See generally* Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018 (1981) (criticizing approach as too simplistic and emphasizing that other discrete relations exist between contracting parties).

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contain an adjustment duty. The circumstances suggest, however, that the parties would have included an adjustment duty if they had dealt with the problem at the formation stage. They would not have placed all the risk on one party.[154] Parties will therefore incur costs contracting around the harsh "superior risk bearer" rule, which may deter some parties from entering contracts. Moreover, in light of the high termination costs involved, we can assume that the parties would select a remedy that would preserve the deal—not ensure its demise. Thus a rule recognizing a potential adjustment duty and, ultimately, even the possibility of court adjustment, may be more efficient and supportive of long-term contracting.[155]

Determining the precise effect that court adjustment will have on the parties' performance would require substantial empirical investigation; such investigation might tell us what approach to adjustment, if any, helps to avoid disputes and leads to more and fairer party settlements of disputes when they do occur. For now, I offer some preliminary observations.

When contract rules clearly define the parties' obligations, the parties may be less likely to "test" the rules in adverse circumstances.[156] Clear rules may thus facilitate performance and help avoid disputes. Similarly, when a dispute does arise, clear rules that enable the parties to determine their settling prices inexpensively may promote settlement.[157] Whether a limited adjustment regime will lead to fewer disputes and more settlements of disputes therefore may depend on the clarity and certainty of the present legal approach as compared to an adjustment approach. One can argue that court adjustment is less clear, affording a court great discretion to decide when to adjust and how to adjust. But the parties' bargaining setting and the contract's standards restrict a judge's discretion.[158] In addition, the present impracticability approach, although it typically ultimately favors the buyer, is itself confusing. Was a risk allocated? What events were foreseeable? When is performance sufficiently costly to be impracticable?[159] If the agreement is not impracticable, is the buyer entitled to specific performance or to full expectancy

154. *See supra* notes 21-29 and accompanying text; *see also* Speidel, *supra* note 4, at 397.

155. *See* Speidel, *supra* note 4, at 390-400 (discussing the pros and cons of the efficiency arguments).

156. Of course, the limited efficacy of contract remedies and the costs and delays of litigation dull this point. *See infra* note 161 and accompanying text.

157. *See, e.g.,* Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUD. 399, 417-20 (1973).

158. *See supra* notes 98-122 and accompanying text.

159. *See supra* note 82 and accompanying text.

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damages?[160]

To the extent that court adjustment *is* less certain than the current approach, another view is that this may favor party settlement. Uncertain court adjustment may induce parties to settle their disputes, just as some parties settle to avoid the uncertainties of a jury verdict. Under this view, court adjustment is "a form of coercive mediation."[161]

Despite the long odds against winning a complete release from any duty to perform, the existing all-or-nothing approach of impracticability may actually encourage suppliers to cease performance and refuse settlement. The hope for a complete release may explain, for example, why the dispute between Westinghouse Electric and operators of forty-nine nuclear power plants concerning Westinghouse's agreement to supply uranium to the plants was not settled prior to a court decision.[162] Westinghouse had agreed to supply uranium to the plants at up to twelve dollars a pound, but the market price then rose sharply to over forty dollars a pound. Westinghouse projected its losses at over two billion dollars. After a decision that Westinghouse was liable for expectation damages, the utility owners of the plants agreed to settle under "extremely lenient terms."[163] Presumably the utilities would have been willing to settle under terms at least as favorable to Westinghouse prior to incurring all of the costs of litigation. This suggests that Westinghouse must have held out, hoping to win a complete release from its duties under the contract.

Although the effect of a limited court adjustment approach on the frequency of party disputes and settlements may be unclear,[164] the quality of settlement is likely to improve. In cases ripe for adjustment, neither party will be able to assert bargaining leverage because each will

160. *See* Young, *Half Measures,* 81 COLUM. L. REV. 19, 28-29 (1981) ("An articulated compromise rule could make lawsuits less of a gamble . . . [and] unpredictability in outcome would not be appreciably worse than under the present system of seemingly rigid, but actually bendable, rules." (quoting Simon & Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts,* 92 HARV. L. REV. 1395, 1436 (1979))).

161. Macaulay, *supra* note 5, at 476. *See also* P. SCHUCK, AGENT ORANGE ON TRIAL 119 (1986); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U. CHI. L. REV. 337, 346 n.30 (1986) (finding "a strong positive relationship between uncertainty of outcome and settlement" in Agent Orange litigation). Thus, although we may seek certain rules to govern commercial affairs for many reasons, promoting settlement may not be one of them.

162. *See* Dawson, *supra* note 7, at 25-26.

163. *Id.* at 25.

164. At least one judge believes court adjustment can "best maintain the integrity of the long-term contractual relationship" when interparty negotiation fails to lead to a fair outcome. McGinnis v. Cayton, 312 S.E.2d 765, 779 (W. Va. 1984) (Harshbarger, J., concurring).

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know that the court is unlikely to decide totally in its favor.[165] This is especially important in the long-term contract setting where the parties typically make significant investments in the contract, where there are few market alternatives and, thus, where the party favored by the existing approach may take advantage of its bargaining leverage to extract significant concessions.[166]

In conclusion, even if a court adjustment regime marginally increased disputes and marginally decreased settlements, it would not necessarily be undesirable. Avoiding disputes or maximizing the settlement rate ultimately may be less important than implementing a just method of resolving disputes. In short, the benefits of court adjustment in terms of fairness to particular parties may outweigh any costs such as diminished settlement of disputes. In fact, at the margin perhaps a fair resolution of disputes maximizes the benefits to society of long-term contracts by encouraging people to enter into them.

III. Conclusion

I neither argue that court adjustment is always proper, nor that parties cannot contract out of it. Court adjustment, however, is appropriate in some circumstances that are sufficiently identifiable. The "relational" realities of modern-day, long-term contracting suggest that when an unanticipated disruption causes calamitous losses to a party, a duty to adjust may arise. Further, if the court finds a duty to adjust, the court can, in some circumstances and often in modest ways, adjust the contract for the parties. Although these "relational" facts support the recognition of an adjustment duty, this does not mean that we must find a radical, new way of looking at contract.[167] We must only pay closer attention to the more accurate factual premises of the relational view as seen in business practice, and we must be willing to show greater courage in fashioning appropriate remedies.

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165. *See* Harris & Veljanovski, *supra* note 147, at 110-11; Harrison, *supra* note 87, at 595-97; Comment, *supra* note 89, at 1003. Of course, if one party is more risk-averse than another, this may affect the observation made in the text.

Professor Macaulay observes that business persons often resort to the courts because they hope to improve their bargaining position, not because they believe the courts will lead to a just resolution of the dispute. Macaulay, *supra* note 43, at 515. *See also* Gordon, *supra* note 24, at 572 (discussing Macaulay's view that private parties resort to courts for opportunistic and tactical reasons).

166. *See supra* notes 22-24, 39 and accompanying text.

167. "[O]ne can be a soldier in the relational contract army without urging a repudiation of existing doctrine." Kidwell, *A Caveat,* 1985 Wis. L. Rev. 615, 621-22.

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